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No. 83-1457

In the Supreme Court of the United States

OCTOBER TERM, 1983

HIPOLITO RIVERA-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to collateral relief from a conviction based on a guilty plea because of various alleged errors in the plea-taking proceeding, when petitioner admitted at that proceeding that he committed acts constituting the offenses in question.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 715 F.2d 453.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1983. A petition for rehearing was denied on January 4, 1984 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on March 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Central District of California to one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a), and one count of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of 15 years' imprisonment, a lifetime special parole term, and fines totalling $50,000 (Pet. App. A4).

1. Proceedings at the plea-taking hearing were translated into Spanish, the language petitioner speaks (Tr. 4-5).[1] The district court read to petitioner a portion of the indictment, including the following passages (Tr. 8-11):

> The * * * objects of the conspiracy were accomplished in substance as follows:
>
> > The defendants arranged for a source of supply of cocaine to provide cocaine for distribution in the Los Angeles, California area and elsewhere.
> >
> > The defendants rented a series of apartments located in various of the buildings comprising the Oakwood Garden Apartments * * *.
> >
> > The defendants purchased various items of paraphernalia for packaging cocaine for distribution to distributors and customers, including plastic baggies, scales, tape, mixing implements, wrapping paper and rubber gloves.
> >
> > The defendants also purchased and obtained equipment for collecting, counting, recording, packaging and storing the large

[1] "Tr." refers to the transcript of the hearing on November 16, 1981, unless otherwise indicated. We have lodged a copy of this transcript with the Court.

> quantities of United States paper currency which was accumulated as a result of the sales of cocaine, including an electric money counting machine * * *.
>
> The defendants also purchased and obtained numerous automobiles to be used to convey large quantities of cocaine and money from place to place. * * *
>
> * * * * *
>
> The defendants * * * organized a network of distributors who sold cocaine and collected the money from the sales and brought it to the Oakwood Garden Apartment complex for counting, packing and reshipment to other destinations.

The district court then discussed the various constitutional rights petitioner would have if he proceeded to trial, asking petitioner in each case whether he understood that he had those rights (Tr. 13-15) and whether he was prepared to relinquish them (Tr. 15-17). The court concluded this phase of the proceeding with the following colloquy (Tr. 16-17):

> THE COURT: Mr. Rivera-Ramirez, do you understand that you don't have to enter a plea of guilty here today, that you have a right to have the government prove its case against you in a court, and if they fail to prove their case against you beyond a reasonable doubt, then you have a right to demand that Counts One and Two and any other charge filed against you be dismissed?
>
> Do you understand that?
>
> DEFENDANT RIVERA-RAMIREZ: Yes, I understand that.
>
> THE COURT: Do you also understand that if you do enter your plea of guilty to Counts One and Two that you will be giving up the

various constitutional rights that we have just been talking about?

DEFENDANT RIVERA-RAMIREZ: Yes, I understand.

THE COURT: Do you understand that you will not have a trial?

DEFENDANT RIVERA-RAMIREZ: Yes, I understand.

THE COURT: Is this what you want to do, to give up your various constitutional rights?

DEFENDANT RIVERA-RAMIREZ: Yes.

THE COURT: Mr. Ramirez, are you pleading guilty freely and voluntarily?

DEFENDANT RIVERA-RAMIREZ: Yes.

THE COURT: Are you pleading guilty because you did indeed commit the acts which are charged in Counts One and Two of this indictment filed against you on October the 2nd, 1981?

DEFENDANT RIVERA-RAMIREZ: Yes.

THE COURT: Has anyone made any kind of a threat against you or anyone that you are related to, or anyone that you hold dear in order to get you to enter this plea?

DEFENDANT RIVERA-RAMIREZ: No.

The district court then repeatedly advised petitioner that it had not yet determined what his sentence would be (Tr. 18-19) and elicited from petitioner, in his own words, his understanding of the maximum sentence; petitioner's understanding was correct (Tr. 21). The court also advised petitioner that his conviction might have consequences for his immigration status (Tr. 23).

When petitioner confirmed that he wanted to plead guilty, the district court said to him (Tr. 25): "Now, Mr. Rivera-Ramirez, I want you to tell me in your own words * * * What did you do? What part did you play in this?" Petitioner replied that he had

helped maintain vehicles that were used as part of what he knew to be a cocaine merchandising operation (Tr. 25). After discussing his role in the offenses further with petitioner, the court asked government counsel if he wished to provide any further information to supplement the factual basis of the guilty plea. Government counsel stated that petitioner had been "unduly modest" and that "if [he] was not the head of the organization he was certainly a very knowledgeable member of it." Government counsel then said that the evidence developed by the government suggested that petitioner had rented two apartments and purchased at least one of the vehicles used in the cocaine conspiracy, and that records found in one of the apartments reflected that petitioner had, on one occasion, transported one million dollars from California to Florida on behalf of the conspiracy. Tr. 27-28. A search of one of the apartments rented by petitioner had uncovered 113.5 pounds of cocaine and $2 million in currency, together with weapons, ledgers, and a money-counting machine (Pet. App. A15-A16).

When government counsel had finished, the following exchange occurred (Tr. 28-31):

> THE COURT: * * * Mr. Rivera-Ramirez, you just heard the United States Attorney indicate certain alleged activity on your part.
>
> Do you disagree with any of the statements that he has just made?
>
> DEFENDANT RIVERA-RAMIREZ: (No response.)
>
> MR. CABALLERO [DEFENSE COUNSEL]: I would just like to address the Court at this moment, your Honor, if I might?
>
> THE COURT: You may do so before I inquire of your client, Mr. Caballero.

MR. CABALLERO: Yes. Thank you, your Honor. It was the intention of my client, it was my representation also to my client, that in order for him to plead guilty to these charges he had to admit guilt, first of all, he had to be guilty and he had to admit his guilt, and that he wanted to do it in a manner that would least inculpate himself and other people that he knew, other than the fact he would give the Court a sufficient factual basis to accept his plea of guilty.

We have attempted to do that in the short statement that he gave the Court. The Court is going to have the benefit of the probation report, and we would urge the Court to accept his plea of guilty on the basis of which he has indicated to the Court, that with knowledge of the narcotic transactions, his participation in transporting, that he himself said, in those automobiles, back and forth, narcotics and money to the location, and that, as such, he is guilty of Counts One and Two.

I would urge the Court to accept that as his plea, as that is the basis upon which I discussed how the plea would be taken of him, that so long as there was a sufficient factual basis that it would not be necessary for him to elaborate on it.

And we will have further information when we talk to the probation office.

THE COURT: All right. Let me inquire, does the government have any opposition to that request by Mr. Caballero?

MR. WALSH [GOVERNMENT COUNSEL]: I just want to make sure that there is a sufficient factual basis, your Honor. And I wasn't sure, perhaps I didn't hear all of what Mr. Rivera-Ramirez had to say, but if Mr. Rivera-Ramirez is admitting to your Honor that he on various

occasions transported cocaine and transported money—

THE COURT: I understood him to say that, yes.

MR. WALSH: I did not. And so perhaps I wasn't listening with sufficient attention.

THE COURT: Let me inquire of him directly with regard to that.

Now, Mr. Rivera-Ramirez, I am asking you whether or not you as a part of the conspiracy which is alleged in Count One of this indictment filed against you on October 2nd, 1981, transported cocaine for distribution on various occasions between January of 1981 and September the 24th, 1981, within the Central District of California.

DEFENDANT RIVERA-RAMIREZ: Yes, I transported it.

THE COURT: And you transported it knowing that it was cocaine; is that correct?

DEFENDANT RIVERA-RAMIREZ: I transported it knowing that it was cocaine.

THE COURT: And on September the 24th, 1981, the time that you were arrested, you knew that within that apartment there was cocaine, even though you did not know the amount or quantity of it; is that correct?

DEFENDANT RIVERA-RAMIREZ: Yes, I know.

The district court then accepted the guilty plea.

2. Petitioner was sentenced on January 29, 1982. At the sentencing proceeding, petitioner's trial counsel and government counsel debated whether petitioner was "HTO," a person who was revealed by ledgers seized from the apartments to be the leader of the conspiracy. Government counsel also emphasized the

size of the conspiracy—noting, for example, that it had $120 million in annual wholesale sales (1/19/82 Tr. 18)—and the harm done to society by cocaine. The prosecutor asked for the maximum sentence (1/19/82 Tr. 25-26). In his allocution, petitioner protested that the prosecuting attorney had erred in characterizing petitioner as the principal figure in the conspiracy (1/19/82 Tr. 29):

> I think the honorable U.S. Attorney could have made an error in his appreciation of my character.
>
> * * * The man responsible and the big man which those books talk about, they had him arrested and they put him—they let him go free the next day.
>
> I am not trying to accuse anybody. I simply want to expose to you, your Honor, that I am not the man that the U.S. Attorney says I am. I pled guilty with the sincere truth of my involvement in the acts of which I am accused.

The district court imposed the maximum sentence.

3. On May 17, 1982, approximately four months after his sentencing, petitioner, after obtaining new counsel, filed a motion under Rule 32(d) of the Federal Rules of Criminal Procedure for leave to withdraw his guilty plea. He primarily argued that the plea proceedings had been conducted in violation of Fed. R. Crim. P. 11. After a hearing, the district court denied his motion, and the court of appeals affirmed (Pet. App. A1-A23).

The court of appeals noted that because petitioner had neither appealed from his conviction nor moved to withdraw his guilty plea within the period allowed for filing a notice of appeal, "his motion amounts to a collateral attack and he must meet the burdens im-

posed upon a defendant who seeks to set aside his plea in collateral proceedings" (Pet. App. A8). Specifically, the court ruled, petitioner was required to show not just a "violation of the formal requirements of [Fed. R. Crim. P.] 11" but "manifest injustice" (Pet. App. A11).

The court of appeals ruled that petitioner had failed to satisfy this standard. It rejected petitioner's claim that he was not adequately advised of the nature of the charges against him, reasoning as follows (Pet. App. A12-A13; footnote omitted):

> In this case, the District Court read the two counts of the indictment to Rivera-Ramirez, and then asked whether those were the charges to which he wished to plead guilty. The indictment read by the judge was unique in that it was unusually factually detailed. Although we do not suggest that reading the indictment will in most instances satisfy the requirements of [Fed. R. Crim. P.] 11, we conclude that the procedure adopted here did not result in manifest injustice. The detailed indictment allowed Rivera-Ramirez, aided by his attorney and an interpreter, to understand the charges against him. Moreover, Rivera-Ramirez has made no showing that he was prejudiced by the court's failure to further explain the charges. He did not claim, at the hearing on his motion to withdraw the plea or in his affidavit submitted to the District Court, that he did not understand the charges or that, better advised, he would not have pleaded guilty. The record of the plea hearing does not support the inference that Rivera-Ramirez did not comprehend what transpired.

The court of appeals also ruled that there was sufficient factual basis for the guilty plea set forth in the

record, although it cautioned that the factual development was "minimally adequate" (Pet. App. A17). The court explained that "[a] more direct response from the defendant to the prosecutor's statements, and more detailed questioning of the defendant, definitely would have been preferable" (*ibid.*; footnote omitted). But because "nothing in the record place[d] the accuracy of the plea in doubt" (*ibid.*), and "[t]he limitations on the factual development of this record resulted in part from tactical decisions by [petitioner] and his attorney" (*id.* at A22 n.5), the court of appeals denied relief.

ARGUMENT

The court of appeals' decision is correct, and we rely on its opinion. While petitioner attempts to portray himself as the victim of an injustice, it is clear that his real objection is not to the guilty plea proceeding but to the severity of his sentence (see, *e.g.*, Pet. 32-34). But petitioner does not deny that the sentence was within the range authorized by law, and the record clearly shows that petitioner entered his guilty plea voluntarily and intelligently with a full understanding of the consequences that might follow. He is, therefore, not entitled to relief.

1. Petitioner appears to agree with the court of appeals that because this proceeding is a collateral attack on his conviction, he must show more than a technical violation of Fed. R. Crim. P. 11. See Pet. 22.[2] But although petitioner urges that there were

[2] Petitioner is plainly incorrect in suggesting (Pet. 21-22) that the court of appeals interpreted *United States* v. *Timmreck*, 441 U.S. 780 (1979), to overrule *McCarthy* v. *United States*, 394 U.S. 459 (1969). The court of appeals merely recognized—as petitioner apparently does (see Pet. 22)—that

numerous flaws in the plea-taking proceeding, he does not explain how he was prejudiced by them.

For example, petitioner asserts (Pet. 10, 24-25) that the district court did not adequately explain to him the nature or the elements of the offenses to which he was pleading guilty. In fact, the district court conducted the plea-taking proceeding in a way that was far more informative than merely advising petitioner of the abstract elements of the offenses would have been; by reading to petitioner an indictment that was readily understandable to a lay person, and by questioning petitioner further, the district court specified for petitioner the nature of the particular criminal scheme of which he was accused.

Moreover, petitioner admitted that he engaged in acts that constituted the crimes with which he was charged, and at the sentencing proceeding he again admitted his involvement in the cocaine distributing operation. There is no reason whatever to believe that any misunderstanding of the precise nature of the offenses—for example, of the distinction between distribution and possession with intent to distribute, a distinction that petitioner accuses the district court of having confused (see, *e.g.*, Pet. 10-11, 25)—could have prejudiced petitioner.

Similarly, although petitioner asserts (Pet. 25-28) that there was no adequate factual basis for his guilty plea, he does not approach making the kind of showing that would entitle him to relief. In particular, as the court of appeals noted, the evidence in the record at the time the sentence was imposed left

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McCarthy does not apply to collateral attacks. See *Timmreck*, 441 U.S. at 784. The "manifest injustice" standard applied by the court of appeals is derived from the language of Fed. R. Crim. P. 32(d), which was the basis of petitioner's motion.

no room for serious doubt about petitioner's guilt. Petitioner specifically admitted not only that he served as automobile mechanic for the conspiracy but that he knowingly transported cocaine in furtherance of the conspiracy and that he knew the apartment he occupied contained cocaine. Moreover, there is no requirement that the factual basis supporting a guilty plea be developed from the defendant's own words; it can be supplied by the government as well. See, *e.g.*, *Sassoon* v. *United States*, 561 F.2d 1154, 1159 (5th Cir. 1977); *United States* v. *Untiedt*, 479 F.2d 1265, 1266 (8th Cir. 1973); *Davis* v. *United States*, 470 F.2d 1128 (3d Cir. 1972). Here, government counsel gave a detailed description, supported by specific references to evidence, of a massive conspiracy in which petitioner played an important role.[8]

2. Petitioner also claims (Pet. 28-32) that he was sentenced on the basis of false information suggesting that petitioner was "HTO." We doubt that this claim can be raised as a reason for seeking to withdraw a guilty plea; even if it were correct, petitioner would presumably be entitled only to resentencing, not to an opportunity to enter a new plea.

But in any event, petitioner's claim is without foundation. The district court described in detail its reasons for imposing the maximum sentence on petitioner (1/19/28 Tr. 30-33). Those reasons concerned the magnitude of the operation, a point petitioner even now does not dispute; the fact that petitioner did play a significant role in the operation, a point he acknowledged at both the plea-taking and

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[8] The United States Attorney's Office advises us that petitioner is incorrect in his assertion (Pet. 18) that the government conceded before the court of appeals that there was no factual basis for the plea of guilty to the conspiracy count.

the sentencing proceedings; and the judge's views about the damage caused to society by trafficking in cocaine and the possible deterrent effect of a severe sentence. The court specifically stated that he was not relying on the conclusion that petitioner was the central figure of the conspiracy (1/19/82 Tr. 32):

> [W]hile you, indeed, may not be HTO, but just having admitted the guilt that you have with regard to this particular matter is sufficient for me * * *. I feel that this is the kind of case where the maximum sentence must, indeed, be given. The message must go out back further than Miami. It must go back to Colombia that when people come here and attempt to destroy our society with the mere aggrandizement of themselves they will be expected to receive the severest penalties possible and they will be meted out.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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